7.5 Equal Pay Act[125] Damages[126]

[Updated: 6/14/02]

Pattern Jury Instruction

The fact that I instruct you on damages does not represent any view by me that you should or should not find [defendant] liable.

If you find that [defendant] unlawfully discriminated against [plaintiff] on the basis of [her/his] sex by paying [her/him] different wages than it paid to [male/female] workers in jobs that required substantially equal skill, effort and responsibility as [plaintiff]'s job and that were performed under similar working conditions, you must then also determine whether [defendant]'s conduct was "willful."[127] "Willful" means that [defendant] either knew that its conduct was prohibited by federal law or showed reckless disregard for the matter.[128] Under this standard, [plaintiff] need not show that [defendant]'s conduct was outrageous and [she/he] need not show direct evidence of [defendant]'s motivation. As I have said for motive, you may (but do not have to) infer willfulness from the existence of those facts that you find have been proven by a preponderance of the evidence.

Once you have determined whether [defendant]'s conduct was willful, you must then determine the amount of damages, if any, that [plaintiff] has sustained.

If you find that [defendant] acted willfully, then [plaintiff] is entitled to damages for the period from [date three years before complaint was filed] until today. You may award [plaintiff] an amount equal to the difference between the amount of pay and benefits[129] that [plaintiff] received and the average amount that [male/female] employees with similar jobs, as I defined similarity earlier, received.[130]

If you find that [defendant] did not willfully discriminate, then you must consider only the time from [date two years before complaint was filed] to today. The amount of your award should be equal to the difference between the amount of pay and benefits that [plaintiff] received and the average amount that [male/female] employees with similar jobs, as I defined similarity earlier, received.

[131]{You may also award [plaintiff] prejudgment interest in an amount that you determine is appropriate to make [her/him] whole and to compensate [her/him] for the time between when [she/he] was injured and the day of your verdict. It is entirely up to you to determine the appropriate rate and amount of any prejudgment interest you decide to award.}

[132]{If you find that [plaintiff] is entitled to damages for losses that will occur in the future, you will have to reduce this amount, whatever it may be, to its present worth. The reason for this is that a sum of money that is received today is worth more than the same money paid out in installments over a period of time, since a lump sum today, such as any amount you might award in your verdict, can be invested and earn interest in the years ahead.

You have heard testimony concerning the likelihood of future inflation and what rate of interest any lump sum could return. In determining the present lump sum value of any future earnings you conclude [plaintiff] has lost or future damages [plaintiff] will suffer, you should consider only a rate of interest based on the best and safest investments, not the general stock market, and you may set off against it a reasonable rate of inflation.[133]}

[134]{Tax Consequences}

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[125] Because the Equal Pay Act is substantively part of the Fair Labor Standards Act (FLSA), this instruction often relies upon FLSA case law to interpret the Equal Pay Act.

[126] This instruction does not ask the jury to assess liquidated damages because the amount of liquidated damages is calculated automatically, by doubling the actual damages award. See 29 U.S.C. § 216(b) (2001). The only variability in an award of liquidated damages is the defense provided by 29 U.S.C. § 260 for cases of good faith errors. 29 U.S.C. § 260 (2001) ("[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938 . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title."). However the good faith question, unlike the question of willfulness, is explicitly committed to the discretion of the court rather than the jury. See Fowler v. Land Mgmt. Groupe, Inc., 978 F.2d 158, 162-63 (4th Cir. 1992) (Title VII and Equal Pay Act) (Ervin, C.J.) (discussing distinction between determinations of "willfulness" and "good faith"); see also Loeb v. Textron, Inc., 600 F.2d 1003, 1020 (1st Cir. 1979) (ADEA) (Campbell, J.) (discussing the applicability of the FLSA's "good faith" requirement to the ADEA where the jury found the defendant had acted "willfully"). As discussed in Fowler and Loeb, a jury could (correctly) answer the willfulness question differently than the judge answers the good faith question.

[127] Depending on whether or not the defendant's conduct was willful, the plaintiff's damages will be limited to a period beginning three or two years, respectively, before the suit was filed,. See Reich v. Newspapers of New England, Inc., 44 F.3d 1060, 1079 (1st Cir. 1995) (FLSA) (Torruella, C.J.) (interpreting 29 U.S.C. § 255 (2001)).

[128] "FLSA violations are willful where the employer 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.'" Reich, 44 F.3d at 1079 (citing McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133 (1988) (FLSA) (Stevens, J.)).

[129] An award for lost benefits must be based on losses the plaintiff suffered, not the cost that the defendant avoided. McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 305 (1st Cir. 1998) (Title VII and Equal Pay Act) (Stahl, J.) (rejecting an award for lost benefits calculated as a percentage of lost salary where there was no evidence that the plaintiff suffered any loss in benefits as a result of a reduced salary). Therefore, in order to recover for lost insurance coverage, the plaintiff must show that he or she incurred out-of-pocket expenses as a result of the lost or diminished insurance coverage. Id. Similarly, to recover for retirement benefits, the plaintiff must show that the defendant employer's contribution to retirement benefits was tied to the plaintiff's salary. Id.

[130] McMillan v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 140 F.3d 288, 305 (1st Cir. 1998) (Title VII and Equal Pay Act) (Stahl, J.) (affirming back pay award calculated by comparing the plaintiff's salary with the average of the salaries of equivalent employees). Damages other than back pay, benefits and liquidated damages are not available. See Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 109 (1st Cir. 1978) (ADEA) (Bownes, J.) ("courts have consistently refused to grant FLSA litigants compensatory damages, other than those allowed under 29 U.S.C. § 216(b)").

[131] There is some conflict in the caselaw, however, about whether this is a question for the jury or for the court. The First Circuit has generally held that "[t]he decision to award prejudgment interest is within the discretion of the trial court." Criado v. IBM Corp., 145 F.3d 437, 446 (1st Cir. 1998) (ADA) (Godbold, J.); accord Troy v. Bay State Computer Group, Inc., 141 F.3d 378, 383 (1st Cir. 1998) (Title VII) (Boudin, J.); Hogan v. Bangor & Aroostook R.R. Co., 61 F.3d 1034, 1038 (1st Cir. 1995) (ADA) (Lynch, J.); Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA) (Cyr, J.); Conway v. Electro Switch Corp., 825 F.2d 593, 602 (1st Cir. 1987) (Title VII) (Pettine, Sr. Dist. J., D.R.I.); c.f. Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 648 F.2d 761, 763 (1st Cir.) (sections 1981 and 1983) (Coffin, J.) ("we agree" that "prejudgment interest is required to make injured parties whole when the injuries they suffer are not 'intangible'"), rev'd on other grounds by 454 U.S. 807 (1981).

However, in at least one case, the court made this statement even though the trial court submitted the question of prejudgment interest to the jury. Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 960-61 (1st Cir. 1995) (Title VII and EPA) (Keeton, J., D. Mass.). In another case, the court implied that prejudgment interest is a jury question, citing the rule that governs prejudgment interest in section 1983 cases, see discussion of the rule governing prejudgment interest in section 1983 cases supra note 97: [P]laintiff did not request prejudgment interest from the jury. He was therefore barred from subsequently seeking it from the judge." Kolb v. Goldring, Inc., 694 F.2d 869, 875 (1st Cir. 1982) (ADEA) (Campbell, J.).

This confusion likely flows from the language of the court's holding in Earnhardt v. Puerto Rico, 744 F.2d 1 (1st Cir. 1984) (Title VII) (Bownes, J.), language that has been cited in most of the subsequent cases to discuss the issue. In Earnhardt, a bench trial where the plaintiff did not request prejudgment interest until he filed a motion to amend the judgment, the First Circuit held (without citation to any other authority):

> The determination of the amount of damages is, absent legal error, a matter for the finder of fact. It cannot be said that either prejudgment interest or an award for lost fringe benefits must, as a matter of law, be part of the damages awarded in a Title VII case. The question of whether they are necessary to make a plaintiff whole is within the discretion of the district court.

Id. at 3.

Considering all of these cases, it appears that an award of prejudgment interest in an Equal Pay Act case is within the court's discretion, but the court may exercise that discretion by submitting the question to the jury. This bracketed paragraph may be used in cases where the question of prejudgment interest is submitted to the jury.

Prejudgment interest is not available if the plaintiff is awarded liquidated damages. Powers v. Grinnell Corp., 915 F.2d 34, 41 (1st Cir. 1990) (ADEA) (Cyr, J.).

[132] These bracketed paragraphs may be used in cases where the plaintiff's claimed damages include future losses, such as retirement benefits, that must be reduced to net present value. See Loeb v. Textron, Inc., 600 F.2d 1003, 1021 (1st Cir. 1979) (ADEA) (Campbell, J.) ("any pension benefits due a prevailing plaintiff normally should be liquidated as of the date damages are settled, and should approximate the present discounted value of plaintiff's interest" (internal citation omitted)).

[133] "The discount rate should be based on the rate of interest that would be earned on the 'best and safest investments.'" Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 537 (1983) (longshoreman's workers' compensation) (Stevens, J.) (quoting Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485, 491 (1916) (Federal Employers' Liability Act) (Pitney, J.)). The "best and safest investments" are those which provide a "risk-free stream of future income," not those made by "investors who are willing to accept some risk of default." Pfeifer, 462 U.S. at 537; Kelly, 241 U.S. at 490-91.

[134] Whether the damages a plaintiff recovers are taxable depends on both the statutory source of the recovery and the type of injury the plaintiff sustained, because the federal tax code excludes from taxable income "any damages . . . received . . . on account of personal physical injuries or physical sickness." 26 U.S.C. § 104; see also, e.g., O'Gilvie v. United States, 519 U.S. 79 (1996) (tax case; medical malpractice) (Breyer, J.) (punitive damages awards are taxable); Commissioner v. Schleier, 515 U.S. 323 (1995) (tax case; ADEA) (Stevens, J.) (back pay and liquidated damages awards in ADEA case are both taxable); United States v. Burke, 504 U.S. 229 (1992) (tax case; Title VII) (Blackmun, J.) (before 1991 amendment, Title VII damages were not "tort-like" and thus were taxable); Dotson v. United States, 87 F.3d 682, 685-86 (5th Cir. 1996) (tax case; ERISA) (Dennis, J.) (applying Schleier and Burke in ERISA case); Wulf v. City of Wichita, 883 F.2d 842, 871-75 (10th Cir. 1989) (section 1983) (Anderson, J.) (examining decisions by the Third, Fourth and Ninth circuits); Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1579-80 (5th Cir. 1989) (Title VII and section 1983) (Gee, J.) ("The distinction between the § 1983 award and the Title VII award is important for federal income tax purposes."); Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989) (Wilkins, J.) (tax case: Title VII and Equal Pay Act). As a general rule, tort-type damages are non-taxable, even if they include damages based on the plaintiff's lost wages, but an award that more closely resembles contract damages, such as an award of back pay, is taxable.

Even after the tax status of each element of a plaintiff's claimed damages is properly established, it is not clear how the tax status of any particular element should affect the final calculation of damages. For example, consider a case involving lost wages. If those wages had been paid properly, they would have been taxed when earned. Therefore, an argument could be made that any award should be reduced to reflect the after-tax value based on the tax rate the plaintiff was subject to in the year in question. On the other hand, an amount the plaintiff receives for those lost wages may be taxable when the plaintiff receives them; thus an argument could be made that the

plaintiff's damages should be enhanced so that the he or she actually receives, after taxes, the amount the jury awarded. As a practical matter, these two factors may offset each other, in which case there is no reason to include a jury instruction about the tax consequences of an award. For an example of the difficulty of resolving this issue, see Wulf, 883 F.2d at 873. See also Johnston, 869 F.2d at 1580 ("We decline to require district courts to act as tax consultants every time they grant back pay awards, speculating as to what deductions and shelters the plaintiff will find, and then calculating the plaintiff's potential tax liability.")

This instruction does not attempt to resolve these issue. In a case where the tax consequences of all or part of a damages award are at issue, it will be necessary to supplement the language of this instruction to reflect the particular circumstances of that case.